

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Inquiry Concerning the Deployment of)
Advanced Telecommunications)
Capability to All Americans in a)
Reasonable and Timely Fashion, and)
Possible Steps to Accelerate Such)
Deployment Pursuant to Section 706 of)
the Telecommunications Act of 1996)

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CC Docket No. 98-146

REPLY COMMENTS OF THE NATIONAL CABLE TELEVISION ASSOCIATION

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The National Cable Television Association ("NCTA"), by its attorneys, hereby replies to the comments filed in response to the Commission's Notice of Inquiry initiated pursuant to section 706 of the Telecommunications Act of 1996.¹

INTRODUCTION AND SUMMARY

The initial comments in this proceeding amply demonstrate substantial investment in "last mile" broadband facilities to customers' homes by cable companies, incumbent and competitive local exchange carriers, wireless service providers, and satellite companies. Clearly, broadband deployment is advancing rapidly in a competitive market.

Given these obvious facts, the Commission should not impose new regulations on cable operators and other new entrants based on speculative and premature fears that these providers

^{1/} Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, CC Docket No. 98-146, Notice of Inquiry, FCC 98-187 (rel. August 7, 1998) ("Section 706 NOI").

may at some point develop bottleneck control over advanced capability. Subjecting providers of advanced telecommunications capability to new regulations would be contrary to the Telecommunications Act of 1996, particularly the deregulatory policy goals of section 706, and long-standing Commission policy. "Regulatory intervention" that imposes additional burdens on new competitors would turn section 706 on its head by reducing, rather than enhancing, the incentives for cable operators and others to invest in broadband facilities.

Requests that the Commission prevent or restrict the offering of cable online services are also irreconcilable with the historical role of cable operators as content providers. Government policy has recognized that cable operators are editors and creators of content, and not merely carriers. Cable operators, with billions of dollars invested in distribution plant, have a natural incentive to develop innovative programming in order to attract subscribers and hence the revenues to make additional investments in plant and programming. Cable operators are making substantial investments in broadband facilities in the hopes of creating similar synergy in the provision of advanced services. Arguments that the Commission should preclude cable operators' integrated provision of advanced facilities and services find no support in the Communications Act. To the contrary, such a policy would weaken cable operators' incentives both to invest in broadband infrastructure and equipment and to develop online content in contravention of the goals of section 706.

I. ADVANCED TELECOMMUNICATIONS CAPABILITY IS BEING DEPLOYED IN A REASONABLE AND TIMELY MANNER

A. There is a Wide Variety of Investment in Interactive Broadband Capability, Including Last Mile Facilities

The initial comments filed in this proceeding demonstrate overwhelmingly that there is, and will continue to be, a wide variety of investment in broadband facilities, including those in

the "last mile" to customers' homes.^{2/} While the cable industry has been an important innovator in the provision of content-enriched Internet services, cable companies are nascent entrants in that market who will not have monopoly control over advanced telecommunications capability. As NCTA demonstrated in its comments, incumbent and competitive local telephone companies, wireless service providers, and satellite companies are all investing tens of billions of dollars to deploy such facilities.^{3/} Local exchange carriers in particular are aggressively deploying xDSL service to compete with cable's broadband service,^{4/} and each will provide the other with a constant incentive to improve the quality, price, and availability of their respective services.

Other new entrants have demonstrated their commitment to playing a prominent role in the delivery of advanced telecommunications services to American consumers.^{5/} Wireless and satellite industry commenters, for instance, confirm that these companies are providing viable broadband "last mile" facilities to customers on a reasonable and timely basis. According to the Personal Communications Industry Association ("PCIA"), the potential market for wireless

^{2/} See, e.g., Ameritech Comments at 7, BellSouth Comments at 3-31, Attachment A, e.spire Comments at 5-7, GTE Comments at 6-8, Level 3 Comments at 2, MCI Comments at 16-21, PCIA Comments at 13-23.

^{3/} NCTA Comments at 14-19, Appendix 1.

^{4/} See, e.g., BellSouth Comments at 13-14, GTE Comments at 10, US WEST Comments at 8-9, MediaOne Comments at 11-12, Appendix 1, NCTA Comments at 14-17. Just this week, Bell Atlantic announced that it was introducing its Infospeed DSL service in selected East Coast markets, including Washington, D.C., and that over seven million subscribers on the East Coast will have access to Infospeed DSL service by the end of 1999. See, e.g., Bell Atlantic Introduces Infospeed DSL Service (Oct. 5, 1998) <<http://www.ba.com/nr/1998/Oct/19981005001.html>>; Introducing Bell Atlantic Infospeed DSL, Wall Street Journal, October 5, 1998 at C26.

^{5/} See Sprint Corporation Comments at 5-6, CTIA Comments at 2-4, PCIA Comments at 13-23.

e-mail and Internet applications is quite significant, at 44.3 million and 39.6 million subscribers, respectively.^{6/} The record evidence in this proceeding also shows that fixed wireless competitive LECs such as WinStar and Teligent are investing billions of dollars and are currently deploying nationwide wireless broadband systems that will reach the large majority of small business customers in the next few years.^{7/} Finally, a number of commenters note that satellite providers such as Hughes DirecPC currently enable users everywhere to download the World Wide Web at 400 kbps using DirecPC and will roll out a two-way high-speed service within the next year.^{8/}

In their comments, MindSpring and AOL erroneously contend that the Commission must regulate access to cable facilities used to provide advanced services because cable companies will establish one of only two "last mile" broadband pipelines to the home.^{9/} In particular, MindSpring predicts that cable operators and incumbent LECs will dominate a "highly concentrated" market for last mile facilities because wireless and satellite companies will not be capable of offering viable broadband, two-way, alternative last mile facilities in the "next five to ten years."^{10/}

^{6/} See PCIA Comments at 17 (citing Third Annual CMRS Competition Report at 62). PCIA also indicates that analysts forecast that by 2001, there will be approximately "11 million wireless e-mail users and 1.6 million wireless Internet subscribers using dedicated data, cellular and broadband PCS, and paging services." Id.

^{7/} See WinStar Comments at 2-3, Teligent Comments at 5-7, Bell Atlantic Comments at 7, Attachment A at 3-4.

^{8/} See, e.g., AT&T Comments 17, NCTA Comments at 19, Bell Atlantic Comments at 7, Attachment A at 5, US WEST Comments at 11.

^{9/} See MindSpring Comments at 23-24, AOL Comments at 2-3.

^{10/} MindSpring Comments at 24. MindSpring's characterization of cable as a bottleneck is particularly unavailing in light of investments by its affiliate Knology Holding, Inc. in "broadband networks capable of delivering interactive video, voice and high-speed data services

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Claims that wireless and satellite companies do not provide a viable broadband alternative are contradicted not only by the record evidence in this docket but also by the Commission's own conclusions, as expressed in various other proceedings. For example, in its recent Third CMRS Competition Report, the Commission stated that companies "are using wireless technology to capitalize on the exploding demand for Internet access and provide individual consumers with services which are comparable, if not superior, to what they can obtain using wireline equivalents."¹¹ The Commission has made similar conclusions with respect to the potential for satellite-based technologies.¹² In a recent speech, Commissioner Ness expressed her belief that wireless and satellite companies alike would provide competitive broadband facilities into customers' homes:

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in selected markets throughout the United States." See Knology: Company Mission (visited Oct. 6, 1998) <<http://www.knology.com/mission.html>>. Knology and MindSpring are both affiliates of ITC Holding Company, Inc. See Functional Organization Structure (visited Oct. 6, 1998) <<http://www.itchold.com/structure.html>>.

¹¹ See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, FCC 98-91 at 64 (rel. June 11, 1998) ("Third Annual CMRS Competition Report").

¹² See, e.g., In the Matter of Redesignation of the 17.7-19.7 GHz Frequency Band, Blanket Licensing of Satellite Earth Stations in the 17.7-20.2 GHz and 27.5-30.0 GHz Frequency Bands, and the Allocation of Additional Spectrum in the 17.3-17.8 GHz and 24.75-25.25 GHz Frequency Bands for Broadcast Satellite-Service Use, IB Docket No. 98-172; RM-9005; RM-9118, FCC 98-235, Notice of Proposed Rulemaking at ¶ 9 (rel. Sept. 18, 1998) ("The [fourteen] currently-licensed GSO/FSS and NGSO/FSS systems . . . have the potential to provide global Internet access, two-way digital communications, videoconferencing, interactive multimedia, telemedicine and residential voice and data communications services. Within the next five to ten years, we anticipate that these services will be provided to millions of United States businesses and consumers using small antenna Ka-band satellite earth stations.").

[T]he wireless industry has enjoyed explosive growth. Wireless technology is poised to provide facilities-based competition to wireline telephony, and serve as a major conduit for Internet access. New satellite-delivered voice and data services are about to be launched, enabling subscribers to reach out and be reached any time any place around the globe.^{13/}

The comments of MindSpring and AOL also conveniently ignore advancements by wireline competitors to deploy additional broadband paths into customers' homes. For example, RCN, a competitive local exchange carrier, is currently deploying fiber to over 9 million homes throughout the Boston/Washington corridor and will soon deploy broadband facilities to millions of homes in hundreds of California communities.^{14/} RCN has partnered with Boston Edison and Potomac Electric Power Co. to build the fiber-optic networks in the Boston and Washington, D.C. areas and will make use of the utilities' fiber optic infrastructure, which can be adapted to carry these new services.^{15/} As part of its broadband deployment strategy, RCN is also aggressively acquiring regional ISPs so that RCN can quickly provide competitive Internet access services directly into customers' homes.^{16/} Other competitive LECs have raised \$15-20 billion to expand significantly fiber deployment for the provision of advanced services.^{17/}

^{13/} Remarks by Commissioner Susan Ness Before PCIA's PCS '98 Orlando, FL (As prepared for delivery) Blueprint for Spectrum Management, 1998 FCC LEXIS 4905 (rel. Sept. 23, 1998).

^{14/} See, e.g., Bell Atlantic Comments, Attachment A at 3 (citing RCN Press Release "RCN Doubles On Net Homes Passed; Advanced Fiber Connections Up More Than 135%" (July 22, 1998)). RCN has thus far passed 122,000 homes with "advanced fiber." Id.

^{15/} See, e.g., Chet Dembeck, Telecom Battle Heats Up, Washington Business Journal (June 22, 1998); Hiawatha Bray, RCN to Buy Two 'Net Service Providers, Boston Globe Online (January 22, 1998) <www.boston.com>.

^{16/} RCN Press Release, "RCN REPORTS RECORD GAINS IN REVENUE, NETWORK CONNECTIONS AND HOMES PASSED; Company Continues to Aggressively Build Its Northeast Customer Base and Local Broadband Fiber-Optic Network" (August 11, 1998) ("In the last 90 days, we have continued to intensify our construction schedule in all of our markets,

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Given the evidence that numerous participants are offering advanced services using innovative, competing technologies, speculative claims that cable companies will establish a “bottleneck” in the last mile to customers’ homes and businesses are groundless. The record in this proceeding shows that there is widespread deployment of broadband capability. As the comments make clear, the communications industry is not lacking in incentives to invest in and deploy a variety of broadband facilities, including in the last mile to the subscriber. Accordingly, there is no factual basis to support a Commission decision to regulate cable or other new entrants’ facilities based upon such unfounded and speculative last mile concerns.

B. There Is No Basis for Claims that Cable Operators Will Restrict Content or Access in an Anticompetitive Manner

Contrary to the assertions of some commenters, there is no basis for claims that cable companies will attempt either to restrict content or “control[] entirely” access to other ISPs in their provision of advanced services.^{18/} MindSpring, for instance, erroneously asserts that cable operators will “exercise disproportionate power over content” by blocking their customers’ access to particular web sites.^{19/} In reality, cable operators providing content-based Internet access services do not restrict their customers from accessing any available content on the web.

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added on-net customer connections ahead of expectations and quietly became one of the nation’s top Internet service providers. At quarter’s end, RCN was providing more than 400,000 people with access to this powerful new medium. Unlike other ISPs, RCN is also able to provide Internet services, including high-speed access, over its own fiber network.”) <<http://www.rcn.com/investor/press/08-98/08-11-98.html>>.

^{17/} See, e.g., e.spire Comments at 6-7, DATA Comments at 7; ALTS Comments at 9.

^{18/} See MindSpring Comments at 16, Center for Media Education Comments at 11, 13.

^{19/} MindSpring Comments at 16.

For example, customers who subscribe to @Home or Road Runner have access to any and all Internet-based content of their choice. Many cable Internet customers use the broadband service daily to access the services provided by America Online, Microsoft Network, Yahoo, Amazon.com, and more. Increasingly, online services are designing content expressly for cable customers.

Likewise, AOL cannot legitimately complain that cable Internet services force customers to “purchase two ISP services to get the one service they want.”^{20/} Today, any cable modem customer can “access AOL” through his or her TCP/IP connection, and AOL itself actively markets such a connection as its “bring-your-own-access” plan (“BYOA plan”).^{21/} Indeed, the BYOA plan offers customers substantial savings over the conventional monthly charge for AOL. For \$9.95 per month, compared with standard monthly charge of \$21.95, BYOA enables any customer, including cable modem customers, to gain “unlimited access to thousands of unique AOL features.”^{22/} There is little difference between customers who choose to access AOL through a separately-purchased ISP such as MSN, MindSpring, or Erols’ Internet, and customers who use AOL’s BYOA plan in connection with @Home or RoadRunner.^{23/}

^{20/} AOL Comments at 10.

^{21/} See “Top 20 AOL Member Questions,” <<http://aol.com/nethelp/top20memberquestions.html>>.

^{22/} Id. (AOL’s BYOA plan is one of “5 pricing plans that provide access to AOL and the Internet. These are designed to appeal to the broadest range of consumers. Of the five offered plans, we hope that one of them will fit your individual needs.”). AOL’s BYOA plan presumably saves AOL money because it allows the company to provide its services to a customer without adding traffic to the backbone facilities it leases from MCI Worldcom.

^{23/} AOL’s complaint about subscribers that must “purchase two services” also rings hollow in light of the fact that BYOA customers can often obtain portal and e-mail functions from their ISP

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The market for Internet access services is highly competitive, with numerous providers and a rich menu of content available to consumers. In this marketplace cable companies are among the new entrants, with relatively few subscribers. This fiercely competitive market is a product of the unregulated nature of the Internet and related businesses,^{24/} confirmed by Congress's declaration that the policy of the United States is to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."²⁵ Internet access providers, including the predominant provider,^{26/} have benefited from this "hands off" approach. Their calls now for new and burdensome regulations on cable companies²⁷ should be rejected as self-serving efforts to entrench their current market position and reduce consumer choice by depriving competitors of the incentives to invest in new facilities and services.²⁸ Just as today's ISPs have thrived in a

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but must purchase these functionalities again from AOL itself in order to gain access to AOL's proprietary content.

^{24/} See NCTA Comments at 29-30 (describing FCC actions designed to free information service providers from regulatory burdens that would impede their growth).

^{25/} 47 U.S.C. § 230(b)(2).

^{26/} See, e.g., Hoover's Online News Alert: Capsule for America Online, Inc. (visited Oct. 7, 1998) <<http://www.hoovers.com/capsules/15558.html?ticker>> (noting that AOL's 12.5 million subscribers make it the world's number one provider of online services, with over 60 percent of market share); About the Company: Profile (visited Oct. 7, 1998) <<http://www.aol.com/corp/profile/>> (explaining that AOL's over 12 million members make it the largest interactive online community in the world).

^{27/} See, e.g., AOL Comments at 10-11, MindSpring Comments at 26-28.

^{28/} Jeopardizing incentives for investment in broadband plant by imposing common carrier-like regulations on cable is particularly inappropriate in light of AOL's own expectations that seventy-five percent of the Internet market will still be using narrowband facilities in five years "because people want it to be as easy and inexpensive as possible." Power Lunch, Television

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“regulatory-free zone,” so too will continued forbearance from regulation lead to continued growth and innovation in the marketplace for broadband services.

II. IMPOSING MANDATORY ACCESS AND OTHER COMMON CARRIER-LIKE REQUIREMENTS ON CABLE SYSTEMS WOULD BE CONTRARY TO THE TELECOMMUNICATIONS ACT OF 1996 AND LONGSTANDING COMMISSION TREATMENT OF NEW ENTRANTS

A. There is No Legal Basis for the Commission to Subject Cable Companies and Other New Entrants to Common Carrier Regulation

On its face, section 706 only addresses the deployment of advanced telecommunications capability. Because cable systems used to provide cable and information services are not providing “advanced telecommunications capability,” such systems are not subject to section 706. As NCTA demonstrated in its comments, this conclusion is supported by the Telecommunications Act of 1996.^{29/}

Despite the expansive body of congressional and Commission precedent on this issue, Circuit City argues that cable operators providing cable or information services over their cable facilities are engaged in the provision of telecommunications and should be regulated as common carriers.^{30/} Circuit City provides no legal support for this position, but simply argues that such services fall within the definition of “telecommunications” because data is transmitted and “cable Internet subscribers choose what information to view and do so without a change in the form or

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Interview with Steve Case, Chief Executive Officer, America Online (CNBC broadcast, September 28, 1998).

^{29/} NCTA Comments at 21-23.

^{30/} Circuit City Comments at 2, 7-8.

content of the information.”^{31/} This simplistic analysis completely ignores Congress’s clear directive that “[a]ny cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service,”^{32/} and overlooks Congress’s express decision to expand the definition of “cable service” to include “interactive services such as game channels and information services made available to subscribers by the cable operator, as well as enhanced services.”^{33/}

Circuit City also ignores the fact that, while information service providers deliver their services “via telecommunications,” the Commission has previously concluded that information services and telecommunications services are separate and distinct regulatory classifications. An information service provider “does not offer telecommunications” -- i.e., a “transparent transmission path” -- even though it may use telecommunications to provide such information services.^{34/} Whether cable’s advanced offerings are cable services or information services, there is no “telecommunications service” for the Commission to regulate under title II.

Despite the fact that Internet access and other advanced services provided over cable systems are not the proper focus of Commission action under section 706, several commenters argue that the Commission should use the section 706 proceeding to “harmonize” the regulatory

^{31/} Id. at 8.

^{32/} 47 U.S.C. § 541(c).

^{33/} H.R. Conf. Rep. 104-458, at 167, 169 (1996) (explaining the effect of the addition of the term “or use” to the definition of cable service) (emphasis added).

^{34/} In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report to Congress, FCC 98-67 at ¶ 39 (rel. April 10, 1998).

treatment of providers of advanced services.^{35/} “Harmonization” that would result in the imposition of common carrier regulation on cable companies and other new entrants is not supported by Congress’s deliberate decision to retain different regulatory models for different industries when it passed the 1996 Act.^{36/} To be consistent with the purpose of section 706, any Commission attempts at harmonization should lead to deregulation, not regulation.^{37/} As Comcast explains in its comments, the Commission should not devote substantial resources to addressing hypothetical concerns about how and whether to create a single regulatory system that would apply to the numerous carriers that are and will be offering advanced services.^{38/} Instead, the Commission’s focus should be on promoting the development of a broadband market populated by numerous and varied players.

Neither section 706 nor any other provision of the Communications Act authorizes the Commission to extend common carrier regulation to cable operators or otherwise disturb the regulatory models established by Congress.^{39/} To the contrary, as AT&T explained in its comments, Congress chose to limit unbundling, “wholesale” resale, and interconnection requirements to dominant common carriers with market power.^{40/} Nothing in the 1996 Act

^{35/} See, e.g., Bell Atlantic Comments at 8, SBC Comments at 4, US WEST Comments at 3.

^{36/} See NCTA Comments at 26 (describing Congress’s decision not to adopt proposals for a uniform regulatory framework).

^{37/} BellSouth Comments at 38, GTE Comments at 14.

^{38/} See Comcast Comments at 19.

^{39/} MediaOne Comments at 13 (explaining that changes in the regulatory structure must come from Congress and Congress chose to retain the current models when it passed the 1996 Act).

^{40/} AT&T Comments at 37-39. Under section 251, only local exchange carriers have an obligation not to prohibit or unreasonably restrict resale of their telecommunications services and

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suggests that Congress intended these requirements to be applied to entities other than common carriers, or authorized the application of requirements designed specifically for incumbent carriers to competitive carriers.^{41/} To the contrary, Congress carefully distinguished among carriers based on their market power.

Companies that do not have market power are subject to different regulatory schemes that seek to encourage them to invest in new technologies and provide alternatives to the facilities of the incumbent LECs.^{42/} The Commission has already concluded that it must find authority other than in section 706 to employ the “regulatory methods” referred to in that section.^{43/} Where, as here, Congress has expressly limited the applicability of requirements such as resale, unbundling, and collocation to common carriers and even to subsets of common carriers, there is no legal authority for the Commission to extend such requirements to other entities.^{44/}

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only incumbent local exchange carriers are required to provide interconnection “at any feasible point,” access to unbundled network elements, and collocation.

^{41/} Cf. Local Competition Order at ¶¶ 1247-48 (precluding state regulatory commissions from applying incumbents’ obligations to competitors).

^{42/} As explained above and in NCTA’s initial comments, Congress was careful not to impose common carrier regulation on cable operators. Instead, it recognized that the evolving nature of cable services should not alter the traditional cable regulatory paradigm and therefore revised the definition of cable service to include information and enhanced services.

^{43/} Section 706 Order and NPRM at ¶ 69.

^{44/} See, e.g., O’Melveny & Meyers v. FDIC, 114 S. Ct. 2048, 2054 (1994) (explaining maxim of “inclusio unius est exclusio alterius,” to include the one is to exclude the others); Foxgord v. Hirschmoeller, 820 F.2d 1030 (9th Cir.), cert. denied, 484 U.S. 986 (1987) (“Under the maxim of statutory construction, ‘expressio unius est exclusio alterius,’ where a statute names the parties who come within its provisions, other unnamed parties are excluded.”).

B. There is No Policy Reason to Subject Cable Companies and Other New Entrants to Common Carrier Regulation

As NCTA explained in its initial comments, section 706 is a deregulatory statute intended to remove barriers to investment in new infrastructure for the provision of advanced services. Imposing burdensome new regulations on cable operators and other new entrants would turn section 706 on its head and chill investment in new facilities.

Subjecting cable operators to common carrier-like obligations would also be an unwarranted departure from the Commission's long-standing policy of relieving new market entrants from burdensome regulation. These policies have recognized that regulation of entities without market power is largely unnecessary and that a reduction in such regulation promotes a competitive marketplace. Nearly two decades ago, in the Competitive Carrier Proceeding, the Commission first concluded that "it would defy logic and contradict the evidence available to regulate in an identical manner carriers who differ greatly in terms of their economic resources and market strength."^{45/} The Commission therefore adopted a regulatory scheme that relaxed the regulatory treatment of non-dominant carriers.^{46/}

^{45/} Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, First Report and Order, 85 FCC 2d 1, 14 (1980) ("Competitive Carrier First Report and Order").

^{46/} The Competitive Carrier First Report and Order was followed by six more orders that built on the conclusions and policies of the initial decision. Second Report and Order, 91 FCC 2d 59 (1982); Order on Reconsideration, 93 FCC 2d 54 (1983); Third Report and Order, 48 Fed. Reg. 46,791 (1983); Fourth Report and Order, 95 FCC 2d 554 (1983), vacated, AT&T Co. v. FCC, 978 F.2d 727 (D.C. Cir. 1992), cert. denied, MCI Telecommunications Corp. v. AT&T Co., 509 U.S. 913 (1993); Fifth Report and Order, 98 FCC 2d 1191 (1984); Sixth Report and Order, 99 FCC 2d 1020 (1985), vacated, MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985).

The recognition that regulation was necessary only insofar as a carrier exercised market power was gradually extended beyond rates and facilities authorizations. For example, “expanded interconnection” between competitors and incumbent telephone companies was applied only to Tier 1 local exchange carriers^{47/} because market forces could be relied on to induce non-dominant carriers to interconnect^{48/} and because extending such obligations to smaller carriers would “tax their resources and harm . . . infrastructure development.”^{49/} Likewise, the Commission rejected requests to mandate interconnection among providers of commercial mobile services because it concluded that “market conditions” did not warrant such a requirement.^{50/}

Against this backdrop, there is no basis or justification for extending interconnection, resale, or collocation requirements to new entrants in the broadband marketplace.^{51/} As set forth above and in NCTA’s comments, cable systems may not be regulated as common carriers or

^{47/} Expanded Interconnection with Local Telephone Company Facilities, Report and Order, 7 FCC Rcd 7369, 7398 (1992) (“Expanded Interconnection Report and Order”) (subsequent history omitted).

^{48/} Expanded Interconnection with Local Telephone Company Facilities, Memorandum Opinion and Order, 9 FCC Rcd 5154, 5184 (1994).

^{49/} Expanded Interconnection Report and Order at 7398.

^{50/} Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, 11 FCC Rcd 18455, 18471 (1995).

^{51/} See BellSouth Comments at 22 (agreeing that cable modems should not be subject to regulation under title II). Indeed, such an expansion of regulation to non-dominant providers would seem inconsistent with the World Trade Organization Agreement on Basic Telecommunications Services, which calls for open markets and reduced regulation of new entrants. See Fourth Protocol to the General Agreement on Trade in Services, April 30, 1996, 36 I.L.M. 366 (1997). The schedules containing commitments in the basic telecommunications sector are available on the World Trade Organization web page at <<http://www.wto.org>>.

utilities by reason of providing cable services, a term that includes Internet access services and other information and enhanced services. None of those requirements has ever been applied to non-common carriers, and an evaluation of the broadband marketplace leads inevitably to the conclusion that such actions would be completely inappropriate in the instant case.

Requiring cable operators to unbundle their cable facilities from their provision of advanced services, either directly or through absolute line of business restrictions or structural separation requirements,^{52/} would undermine the goals of section 706 by chilling investment in new facilities. The deployment of traditional cable networks as well as today's investment in broadband plant have been funded totally by risk capital. There is no guaranteed rate of return for cable operators, and their ability to earn a return on the significant investments necessary to upgrade cable plant to provide broadband services will depend solely on their ability to compete in this new marketplace.

As Cablevision explained in its comments, many cable operators believe that high-speed capability alone will not allow them to compete against incumbent ISPs with large customer bases and other competitors that are actively investing in their own high-speed platforms. Cable companies have therefore invested heavily in the development of online content in order to attract subscribers.^{53/} Investment in broadband cable plant in turn is driven in large part by operators' desires to provide these new advanced content-based services, as well as improved video services.^{54/} Limiting cable operators to the role of tollbooths on the information

^{52/} See MindSpring Comments at 26-28, Center for Media Education Comments at 13.

^{53/} Cablevision Comments at 3.

^{54/} Id. at 4, 6.

superhighway, as some commenters propose.^{55/} would not afford cable with the economic incentives necessary to justify the substantial risk of investing in new networks.

Calls for “unbundling” the cable plant also overlook the critical role the cable industry’s deployed infrastructure plays in delivering high-speed cable Internet service. @Home’s backbone network, for instance, was designed specifically to take advantage of cable’s existing coaxial drops. @Home’s investment in this “parallel Internet” enables subscribers to avoid the problems of Internet congestion and architectural bottlenecks beyond the “last mile” that often limit the speed of other Internet access services. Its proprietary network overcomes the delays inherent in the duplicative data transfers that characterize other backbones. Applying an unbundling requirement to cable operators – or to @Home – would deter the very investment that section 706 seeks to foster.

Requests that the Commission prevent or restrict the offering of online services are also irreconcilable with the historical role of cable operators as content providers. Both Congress and the courts have recognized that cable operators are editors and creators of content, and not merely carriers.^{56/} Cable operators, with billions invested in distribution plant, have a natural incentive to develop innovative programming in order to attract subscribers and with them the revenues to make additional investments in plant and programming. Cable operators are making substantial investments in broadband facilities in the hopes of creating similar synergy in the provision of

^{55/} Circuit City Comments at 12, MindSpring Comments at 8, 21.

^{56/} See, e.g., 47 U.S.C. § 541(c); Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 636-637 (1994) (citing Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 494 (1986) for proposition that cable programmers and operators are entitled to speech and press protections of

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advanced services. Precluding cable operators' integrated provision of advanced facilities and services finds no support in the Communications Act. To the contrary, it would weaken cable operators' incentives to both invest in broadband infrastructure and equipment and develop online content in contravention of the goals of section 706.

Finally, Circuit City argues that mandating open access to broadband facilities would speed the deployment of advanced services and, consequently, create a more competitive market for cable modems.^{57/} Circuit City's desire to sell more cable modems, standing alone, is no justification for imposing regulations that would restrict new entrants' incentives to invest in broadband plant in the first place. The Commission has already taken adequate steps to ensure the commercial availability of navigation devices, including cable modems, which were explicitly covered in the Commission's order implementing section 629 of the Communications Act.^{58/}

If, as many commenters suggest, there are ample alternative pathways into customers' homes, the existence of these pathways will lead to demand for a wide range of customer premises equipment to access those pathways. Presumably, as is the case with cable modems,

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First Amendment because they seek to communicate messages on wide variety of topics and in wide variety of formats).

^{57/} See Circuit City Comments at 12-13.

^{58/} Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices, CS Docket No. 97-80, Report and Order, FCC 98-116 at ¶¶ 8, 25 (rel. June 24, 1998).

Circuit City and others will sell that equipment in a competitive marketplace.^{59/} The Commission should resist any requests to take action that would inhibit infrastructure investment and delay the development of advanced capabilities, thereby undermining the purposes of section 706.^{60/}

CONCLUSION

Section 706 is a deregulatory measure intended to ensure the removal of barriers to investment in new infrastructure. As the comments make clear, many different segments of the communications industry are investing in and deploying a variety of broadband facilities, including those in the last mile to the subscriber. Because advanced capability is being deployed in this reasonable and timely manner, there is no need for the Commission to act pursuant to section 706. The Commission should therefore reject requests that it subject cable operators and other new entrants to burdensome new regulations based on speculative and unfounded fears of hypothetical bottlenecks in the last mile. There is no legal authority for the Commission to adopt

^{59/} Without any Commission intervention, the cable industry has taken the lead in developing interface specifications for interoperable, non-proprietary cable modems so that cable modems produced by a variety of manufacturers will work on multiple cable systems and be available to consumers at local retail outlets. MediaOne and Circuit City recently announced a partnership to sell cable modems and MediaOne Express, a high-speed Internet service, to consumers. See MediaOne Announces First of Its Kind Partnership With Circuit City to Offer Bay Network Cable Modems and High Speed Internet Service (released Sept. 23, 1998) <<http://pathfinder.com/money/latest/press/PW/1998Sep23/777.html>>. See also In the Matter of En Banc Hearing on Broadband Services (July 9, 1998), Transcript Comments of Milo Medin, Senior Vice President for Engineering and Chief Technology Officer, @Home Network, at 61-63, <<http://www.fcc.gov/enbanc/070998/eb070998.html>> (describing retail availability of cable modems).

^{60/} Several commenters who are concerned with anticompetitive behavior by building owners and incumbent local exchange carriers have asked the Commission to eliminate restrictions on access to multi-dwelling units and guarantee access to inside wiring. Comments of Teligent at 6-7, AT&T at 48-52, ALTS at 19, WinStar at 7-21, and OpTel at 3-7. The FCC has already

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such a policy. Moreover, these proposals are contrary to Congressional goals and long-standing Commission treatment of new entrants, and would discourage investment in broadband facilities, the very purpose of section 706.

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adopted rules governing access to cable plant, and NCTA does not believe that this issue needs to be reopened in the instant proceeding.

CERTIFICATE OF SERVICE

I, Michelle Mundt, hereby certify that on this 8th day of October 1998, I caused copies of the foregoing "Reply Comments of the National Cable Television Association" to be sent by hand delivery (*) or first class mail, postage pre-paid to the following:

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